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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Revision of Part 22 of)
the Commission's rules)
governing the Public)
Mobile Services)

CC Docket No. 92-115

To: The Commission

REPLY COMMENTS OF
FEDERAL COMMUNICATIONS BAR ASSOCIATION

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SUMMARY OF REPLY COMMENTS

The Federal Communications Bar Association ("FCBA") is comprised of attorneys who practice regularly before the Commission. Accordingly, FCBA is uniquely qualified to provide comments to the Commission on the proposed revisions to Part 22 as they affect the practitioner.

As set forth below, the FCBA believes that certain of the Commission's proposals require clarification or modification:

- Proposed Section 22.101: The Commission should recognize its computer database of Part 22 licensing information as a co-equal official record with the existing station files and Public Notices.
- Proposed Section 22.105: The Commission should retain its existing 5-page minimum page limit for microfiched pleadings and its existing policies which permit the filing of deferred microfiche.
- Proposed Sections 22.147 and 22.167: Although the FCBA takes no position on the merits of conditional licensing or the finder's preference, if the Commission adopts either of these proposals it should carefully define their scope in order to minimize uncertainty to practitioners and their clients, and to conserve scarce Commission resources.
- Proposed Form 401: The revised Form 401 should support the transition from NAD27 to NAD83 coordinates by giving applicants the opportunity to specify equivalent NAD83 coordinates in addition to the required NAD27 coordinates.
- Proposed Form 490: The revised Form 490 should reflect two areas of current practice. It should permit the specification of two different fee codes on the same Form 490 (as occurs with multiple-callsign Public Mobile Service transfers and assignments) without the use of a separate Form 155. It should place the assignor/transferor signature and the assignee/transferee signature on separate pages to permit the independent preparation and execution of their respective portions of the form.

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The Federal Communications Bar Association ("FCBA"), pursuant to Section 1.415(c) of the Commission's Rules, hereby files Reply Comments with respect to the Notice of Proposed Rulemaking adopted in the above-captioned proceeding.^{1/} FCBA generally supports the Commission's goal of updating Part 22 of the Rules; it offers the specific comments suggested herein.^{2/}

INTEREST OF FCBA

The FCBA is a District of Columbia non-profit, non-stock corporation originally founded in 1936 whose chartered purpose is "to promote the proper administration of the federal laws relat-

^{1/} Revision of Part 22, 7 FCC Rcd 3658 (1992) (Notice of Proposed Rulemaking) ("NPRM").

^{2/} Although FCC employees constitute a substantial portion of the FCBA's membership and are represented on the FCBA's Executive Committee, those members did not participate in the preparation of these Reply Comments or in the Executive Committee's consideration thereof. The position of the FCBA is limited to the specific issues discussed herein. As to all other issues in this proceeding, the FCBA takes no position. Further, as with the comments of any association, these Reply Comments do not necessarily represent the views of each FCBA member.

ing to wire and radio communications." Its membership is comprised of more than 1,900 lawyers who practice regularly before the Commission. Accordingly, FCBA is uniquely qualified to provide comments to the Commission on the proposed revisions to Part 22 as they affect the practitioner.

SPECIFIC COMMENTS

As a general proposition, FCBA supports the purpose of updating Part 22. However, FCBA believes that certain of the Commission's proposals require clarification or modification. Accordingly, using the section-by-section format which the Commission used in Appendix A to the NPRM, FCBA has the following specific comments:

Proposed Section 22.101 -- Official Record Current Commission practice is that the Public Notices and station files are the only official Commission records for Part 22 applicants and licensees. Proposed Section 22.101 states that the Commission's computer database of licensing information is not an official Commission record and cannot be relied upon to establish or deprive parties of their rights. This would in effect codify the Mobile Service Division's present practice.

The FCBA opposes adoption of proposed Section 22.101. Instead, the Commission should recognize its computer database of Part 22 licensing information as a co-equal official record with the existing station files and Public Notices. The present system places applicants and licensees at a disadvantage, in that

the Commission uses its database to dismiss applications but private parties cannot use the database to establish acceptability or grantability. As comments in this proceeding have described, the Commission's station files are inadequately maintained and not always accessible. Moreover, searching the collected volumes of Part 22 Public Notices to determine correct licensing information is impossible.^{3/}

Further, as the NPRM itself indicates, the Commission staff both relies on the database as its primary source of licensing information, and expects applicants to do likewise:

We are presently undertaking efforts to eliminate from our computer data base duplicate and erroneous records of expired facilities. Our intent is to make this data base as accurate as possible. These efforts should enable applicants to continue to provide reliable technical exhibits.^{4/}

Thus, the proposed Section 22.101 would create a paradox in which an application could be dismissed -- and, if the Commission adopts its conditional-licensing proposal, a station's operations could be halted -- for being inconsistent with the Commission's "computer data base," but the applicant or licensee could not rely on that data base to defend its engineering.

^{3/} Indeed, the Commission's proposed reliance upon station files as its sole official record could raise questions under Section 552(a)(2)(i) of the Administrative Procedure Act, 5 U.S.C. §552(a)(2)(i), which requires that, "A final order ... that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than the agency only if it has been indexed...."

^{4/} NPRM, supra, 7 FCC Rcd at 3659 (emphasis added).

While the FCBA supports recognition of the Commission's database as a co-equal official record, reliance on the database should be tempered by the further recognition that errors affect the database just as they affect paper records. Both applicants and petitioners should be permitted to rely on extrinsic sources to establish that the database is incorrect.^{5/} If a discrepancy is found to exist between the Commission's database and its underlying paper records, the applicant should be afforded a 30-day period to amend its application to correct the deficiency without losing any substantive rights.

Proposed Section 22.105 -- Microfiche and Diskette Filings The Commission has proposed to tighten its existing requirements for microfiche submittals substantially by (a) requiring all applications on standard forms to be microfiched, (b) requiring that all submissions relating to a "current or pending application or an existing authorization" be microfiched, and (somewhat inconsistent with the first two requirements) requiring that all filings longer than three pages be microfiched.^{6/} As proposed, this

^{5/} In particular, the Commission has also proposed to grant Part 22 applications under a "first come, first served" ("FCFS") licensing scheme. Assuming that the Commission ultimately adopts such a system, it would be manifestly unfair to penalize an applicant who relied on the Commission's database in filing an application which was defective because of database errors.

^{6/} NPRM, supra, 7 FCC Rcd at 3664. The cumulative effect of these requirements appears to make all filings under Part 22 subject to the microfiche requirement.

requirement would be needlessly burdensome upon FCBA members and their Part 22 clients.

Specifically, the Commission should retain its existing 5-page minimum page limit for microfiched pleadings and its existing policies which permit the filing of deferred microfiche copies. This would be consistent with the terms of the Office of Management and Budget's original approval of the Commission's microfiche requirements.^{7/} In the FCBA's experience, its members experience an increase in microfiche errors and a dramatic increase in costs for rush microfiching. These costs -- which ultimately are borne by communications subscribers -- do not serve the public interest.

The Commission also stated its intention to begin accepting Part 22 applications and amendments thereto on diskette after appropriate procedures are developed. The Commission currently has the International Frequency Registration Board ("IFRB") proceeding pending (CC Docket No. 92-160). If the Commission should see fit to adopt diskette procedures for IFRB data, it may wish to consider expanding the procedures developed in that docket to apply to entire Part 22 applications in a single filing. At such time, the Commission could dispense with any

^{7/} See Letter from Franklin S. Reeder to Edward J. Minkel dated February 23, 1989 (OMB control number 3060-0420) (granting OMB approval to the Part 22 microfiche requirements subject to a minimum five-page limit and to deferred filings of microfiche for short-deadline and other filings in which the "concurrent submission of microfiche would substantially adversely affect the interests of the filer").

requirements for the concurrent submission of microfiche copies of applications as being superfluous.

Proposed Section 22.147 -- Conditional Grants The Commission proposed to make all grants of PLMS applications perpetually conditional "upon the condition of non-interference for the entire term of the license."^{8/} Under this proposal "the Commission would retain the right to order the licensee, without affording an opportunity for a hearing, to suspend operation of the facilities at the locations causing the interference" Id. This power would be limited to interference which occurs "because of an error or omission in the technical exhibits to the application...." The Commission intends that an applicant's certification of the accuracy of its engineering, as well as this license condition, would eliminate the need for any pre-grant technical review.

Although the FCBA takes no position on the merits of conditional licensing, from its collective experience it knows that far-reaching new regulatory schemes must be carefully defined in order to minimize uncertainty to practitioners and their clients, and to conserve scarce Commission resources.

Concerns previously have been expressed in this proceeding to the effect that the Commission's blanket powers to terminate operations could disrupt service to the public. Accordingly, the FCBA respectfully requests that the Commission address the

^{8/} NPRM, supra, 7 FCC Rcd at 3659.

following and similar issues in its consideration of this proposal:

- What are a licensee's rights if the Commission erroneously orders it to cease operations?
- What happens if interference occurs, but is not caused by "an error or omission in the technical exhibits"?
- Can a licensee continue operations while it contests the existence of a violation of its license condition? Or must it cease operations while the Commission decides whether it acted properly?

Additionally, the Commission needs to decide whether it intends to modify all existing Public Mobile Service licenses to include its proposed condition and, if so, to identify the legal basis for its authority to do so.

Proposed Section 22.167 -- Finder's Preference The Commission has proposed to grant finder's preferences to interested parties who provide information to the agency that an authorized channel is in fact not being used. If the Commission were to cancel the affected authorization, the finder's application would be deemed the first-filed for this channel."^{2/} This proposal has generated a great deal of comment, both pro and con.

Without taking a position on the merits of this proposal, the FCBA respectfully suggests that, if the Commission adopts a finder's preference for Part 22, it should provide as much information as possible for the types of rule violations and the specific showings required to make a finder's preference showing.

^{2/} NPRM, supra, 7 FCC Rcd at 3660.

Specifically, the FCBA is concerned both with the possibility of meritless filings, and with the possibility of arbitrary Commission action (either in favor of or against licensees) if the criteria for ruling on finder's preference showings are not adequately spelled out. The uncertainty which results when regulatory standards are insufficiently defined would not serve the public interest.

The FCBA is also concerned that the Commission has not considered the relationship between a finder's preference showing and the anti-monitoring provisions of Section 705 of the Communications Act, i.e., whether monitoring a channel for the purposes of determining activity (or inactivity) but not for the purposes of determining content would be deemed a violation of Section 705.

Proposed Form 401 -- NAD27/NAD83 Coordinate Specification In the continental United States, geographical coordinates (latitudes/longitudes) traditionally have been specified with respect to a geodetic reference system known as the North American Datum of 1927 ("NAD27").¹⁰ All current Commission rules and forms require the specification of coordinates using the NAD27 datum. Proposed Section 22.115 and the proposed revision to Form 401 make no change in this practice.

¹⁰ See generally Public Notice, "The Federal Communications Commission Continues to Require Applicants to Use Coordinates Based on the North American Datum of 1927", 7 FCC Rcd ____ (DA 92-1188, released September 1, 1992).

However, as required by Section 9120 of the Aviation Safety and Capacity Act of 1990 (P.L. 101-508), as of October 15, 1992, the Federal Aviation Administration has converted its tower and structure coordinates to the North American Datum of 1983 ("NAD83"), an improved reference system. The Commission similarly must convert its coordinate data to the NAD83 system, although no conversion schedule has been announced. Until this conversion is completed, the FCBA is concerned that the transition between NAD27 and NAD83 coordinates be accomplished with the minimum amount of confusion.

To this end, the FCBA respectfully suggests that revised FCC Form 401 should permit the parallel specification of coordinates, i.e. with a mandatory item for NAD27 coordinates and an optional item for the equivalent NAD83 coordinates. Giving applicants the option to specify both sets of coordinates when available (i.e. when an FCC filing requires the concurrent submission of an FAA Form 7460-1) should eliminate ambiguity in the specification of coordinates appearing on a revised Form 401.

Proposed Form 490 -- Form Design Issues The Commission's current Form 490 has the transferor/assignor signature on one page of the Form, and the transferee/assignee signature on the other page. Practitioners have found this format to be convenient, in that it permits the transferor/assignor to prepare and execute its portion of the form in parallel with the transferor/assignor.

The Commission's proposed Form 490 places both signatures on the same page. This will be much less convenient for practitioners and their clients.

Accordingly, the FCBA recommends that the Commission restructure its proposed Form 490 to again place the transferor/assignor signature on one page of the Form, and the transferee/assignee signature on the other page. This could be done by deleting (or perhaps moving) Item 8(b) on page 1 of the proposed Form 490, the tabular description of the shares to be transferred.^{11/} The item is rarely, if ever, used in the present Form 490 and serves no apparent regulatory purpose.

At the present time, every Form 490 must be accompanied by a separate Form 155 for the filing fee. Although the proposed form includes sufficient fee information to eliminate the need for an FCC Form 155 in a single call-sign assignment/transfer, the fee items do not permit specification of two different fee codes on the same Form 490.^{12/} The FCBA believes that the proposed Form 490 should be revised to accommodate this situation and hence eliminate any need for a separate Form 155.

^{11/} Several comments in this proceeding have proposed to consolidate the assignment-of-license/transfer-of-control process into a single "transfer" application. If this were done, then all of Item 8 could be deleted from the Form.

^{12/} This commonly occurs, for example, with a proposed transfer or assignment of a common-carrier paging system comprising several call signs. In such an application, the first call sign is assessed a \$230 filing fee (fee code CMD) and each of the others is assessed a \$35 filing fee (fee code CAD).

CONCLUSION

Accordingly, the Federal Communications Bar Association respectfully requests that the Commission consider and adopt the changes suggested herein.

Respectfully submitted,

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